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In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC. and THOMAS F. WADDELL, M.D.,
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. In enacting the "Amateur Sports Act of 1978," 36 U.S. Code sections 371 et seq., did Congress intend to bestow upon the United States Olympic committee (below, "USOC") an exclusive authority to prohibit and enjoin virtually any and every use of the word "Olympic"?

2. Are the well-established tenets of trademark law that generic terms cannot be trademarks and that a party may use an otherwise incontestable trademark fairly to describe its goods or services rooted in First Amendment considerations of preserving freedom of speech and protecting the richness of the human vocabulary against claims of private ownership?

3. Given that USOC was created and chartered by Congress to perform a public function, and given that USOC receives and uses substantial public resources to that end, is USOC engaged in "state action" such that it may not violate the First and Fourteenth Amendments by selecting among diverse potential users of the word "Olympic," based upon speech-suppressing and invidiously discriminatory motives?

4. Can an injunction prohibiting use of "Olympic" by a nonprofit corporation that is tangentially engaged in raising money for its cause be reconciled with trademark infringement and commercial speech precedents that require balancing of the governmental interests in regulating fraudulent commercial speech against free speech interests?

5. If the Amateur Sports Act of 1978 settled nothing more or less than incontestable trademark upon USOC as to the word "Olympic," should that trademark be enforced according to the standard of proof and defenses to trademark infringement, as well as the standard for awarding attorneys' fees, developed over forty years of litigation under the Trademark Act of 1946?

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On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals affirming the summary judgment and the permanent injunction, and reversing and remanding the award of attorneys fees, is reported at 781 F.2d 733 (9th Cir. 1986), and it is presented to this Court in the Petition for Certiorari, (below, "P.Cert."), Appendix (below, "App.") 1, pp. 1-24. The order amending that opinion, denying rehearing and rejecting the suggestion of *en banc* review, is reported at 789 F.2d 1319 (9th Cir. 1986)(P.Cert., App.2, pp.25-27). The opinion dissenting from denial of *en banc* review of that opinion is reported at 789 F.2d 1320 (9th Cir., 1986)(P.Cert., App.3, pp.28-59.) The order of the U.S. District Court granting summary judgment was not accompanied by a

written opinion. The transcript of hearing in which the District Court determined to grant summary judgment is presented in the second volume (below, "II") of the Joint Appendix (below, "J.A."), at pp. 258-272; and the oral order granting summary judgment is excerpted in P.Cert., App. 4, pp.60-66. The written opinion of the U.S. District Court granting an award of attorneys' fees to respondents USOC and IOC is unreported (P.Cert., App.5, pp.67-76.) The opinion of the Court of Appeals for the Ninth Circuit affirming the preliminary injunction to USOC and IOC was not reported (P.Cert., App. 7, pp.81-90.) The opinion of the U.S. District Court issued upon grant of the preliminary injunction is reported at 219 U.S.Pat.Q. 983 (N.D. Cal. 1982)(P.Cert., App. 8, pp.91-127.)

JURISDICTION

The opinion of the U.S. Court of Appeals for the Ninth Circuit deciding the merits of this action was issued on January 27, 1986. That opinion was amended on May 22, 1986, upon the Court of Appeals' denial of rehearing and rejection of a suggestion for *en banc* review; a timely petition for rehearing, suggesting *en banc* review, was filed by petitioners San Francisco Arts & Athletics Inc. and Dr. Waddell (below, "SFA&A" and "Waddell") on February 10, 1986. The mandate was stayed by the U.S. Court of Appeals for the Ninth Circuit for ninety (90) days from May 22, 1986, the date of denial of rehearing, to enable SFA&A to file a petition for writ of certiorari in this Court. The petition for certiorari was filed within ninety (90) days of May 22, 1986, on August 19, 1986. This Court's jurisdiction is invoked under 28 U.S. Code section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. I:

"Congress shall make no law . . . abridging the freedom of speech . . .". (1791)

U.S. Const., Amend. XIV:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

"Amateur Sports Act of 1978," P.L. 95-606, sec.1(b); 92 Stat. 3048; 36 U.S. Code section 380:

Without the consent of the Corporation [United States Olympic Committee] any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

(1) the symbol of the International Olympic Committee, consisting of 5 interlocking rings;

(2) the emblem of the . . .[USOC], consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief;

(3) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee or . . .[USOC]; or

(4) the words "Olympic," "Olympiad," "Citius Altius Fortius," or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with . . . [USOC] or any Olympic activity;

shall be subject to suit in a civil action by . . . [USOC] for the remedies provided in the Act of July 5, 1946 (60 Stat. 427; popularly known as the Trademark Act of 1946). However, any person who actually used the emblem in subsection (a)(2) of this section, or the words, or any combination thereof, in subsection (a)(4) of this section for any lawful purpose prior to September 21, 1950, shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services. In addition, any person who actually used, or whose assignor actually used, any other trademark, trade name, sign, symbol, or insignia described in

subsection (a)(3) and (4) of this section for any lawful purpose prior to enactment of this chapter shall not be prohibited by this section from continuing such lawful use for the same purpose and for the same goods or services.

(b) . . . [USOC] may authorize contributors and suppliers of goods and services to use the trade name of the Corporation as well as any trademark, symbol, insignia, or emblem of the International Olympic Committee or of the Corporation in advertising that the contributions, goods, or services were donated, supplied, or furnished to or for the use of, approved, selected, or used by . . . [USOC] or United States Olympic or Pan-American team or team members.

(c) The Corporation shall have exclusive right to use the name "United States Olympic Committee"; the symbol described in subsection (a)(1) of this section; the emblem described in subsection (a)(2) of this section; and the words "Olympic," "Olympiad," "Citius Altius Fortius" or any combination thereof subject to the preexisting rights described in subsection (a) of this section.

STATEMENT OF THE CASE

The focal point of this controversy is the meaning of 36 U.S. Code section 380, quoted immediately above, as it applies to the use of the word "Olympic" by petitioners, who are a corporation named "San Francisco Arts & Athletics Inc." ("SFA&A"), and one of its chief founders and officers, Dr. Thomas Waddell ("Waddell"). Section 380 is part of a statute enacted by Congress in 1978 that bestows an array of powers and responsibilities upon respondent, United States Olympic Committee ("USOC"), in the governance and management of U.S. amateur athletics and the participation of U.S. amateur athletes in contests including the Pan American Games and the Olympic Games. Pub.L. 95-606; 92 Stat. 3045 et seq.; 36 U.S. Code section 371 et seq.

In 1981, SFA&A began plans to stage a "Gay Olympic Games" to occur in autumn 1982, in San Francisco, California. (J.A. I-92) SFA&A is a California nonprofit

corporation (Record at Docket # ("R.") 18 at Exhibit ("Ex.") CC thereof). SFA&A's charter purpose is to "educate the general public on the vitality, variety and versatility of the gay movement." (R. 18 at Ex. DD; J.A.I-102) In the words of petitioner Waddell, the purposes of SFA&A's "Gay Olympic Games" were: to "but provide a healthy recreational alternative to a suppressed minority," to wit., those of gay/lesbian sexual orientation, to "educate the public at large towards a more reasonable characterization of gay men and women," and to "attempt, through athletics, to bring about a positive and gradual assimilation of gay men and women, as well as ... non-gays, and to diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation." (J.A.I-93) By the plans of SFA&A's organizers and volunteers, this political and philosophical desideratum is to be implemented by the staging of a quadrennial athletic competition, starting in 1982 and continuing indefinitely, international in outreach, "Olympic" in "format" (J.A.I-93) and nonprofit and non-commercial in principle and in operation (J.A.I-93-99, 102, 104), "to bring people together for greater understanding and physical fitness and not for the purpose of establishing one group being better than any other" (J.A.I-94).

In mid-year 1981, the founders of SFA&A sought to incorporate a nonprofit organization using the name "Golden Gate Olympic Association," and they were told that the word "Olympic" could not be used in a corporate title. (J.A.I-95) Then re-naming the corporation "San Francisco Arts & Athletics Inc.", the founders proceeded to plan and promote a "Gay Olympic Games," set to occur in autumn 1982, in the "belief" that they could use the word "Olympic" "to describe one of the events we intended to sponsor, i.e. the 'Gay Olympic Games'." (J.A.I-95).

In promoting the "Gay Olympic Games," and in creating and selling items to finance it, SFA&A, Waddell and those associated with them did not at any time use any trademark, trade name, sign, symbol, emblem or insignia mentioned in

36 U.S. Code section 380, other than the words "Olympic" and "Olympics"; SFA&A and its participants used the words "Olympic" and "Olympics" only in clear, open and repeated combination and association with the word "Gay" (J.A.I-100, 115; R.17 at Ex.'s A-E, G-U, BB-DD, II, JJ). SFA&A's purposes in using the words "Olympic" and "Olympics" included: to convey the format of the Gay Games, to "best describe [SFA&A's] undertaking" which seeks "peace, friendship and positive social interaction [for the same reasons] as the Police and Fireman, Armenians, Senior Citizens, Handicapped and Youngsters all enjoy their own separate 'Olympics'" (J.A.I-95, 99), and to identify the activity of an athletic competition, in its "Greek" and "dictionary" senses (J.A.I-115).

Upon being told, by a person involved in amateur athletics in mid-December 1981, that SFA&A "may be in trouble" relative to use of "Olympic," Waddell called an employee of USOC in the public relations department at Olympic House. That employee told Waddell to write a letter to USOC requesting permission to use "Olympic"; that employee also told Waddell that it is "generally just a formality because the USOC could not go about taking court action on everyone who uses the word 'Olympic' ". (J.A.I-95) Waddell wrote such a letter to USOC on December 26, 1981. (R.6 at Ex.'s B and C; (J.A.I-33).

From December 1981 through February 1982, a number of communications including telephone calls and letters were exchanged between the parties to this litigation and among their attorneys concerning SFA&A's use of the word "Olympic" in connection with the planned Gay Olympic Games. (R. 5, at Ex.s' A-D; R. 6, at Ex.s' A-H; R.17 at Ex.'s A-E; J.A. I-30-31, 33-35). In this litigation, USOC argues that during this communication Waddell conceded that SFA&A would permanently agree that it would not use "Olympic"; SFA&A claims otherwise. (J.A.I-34-35, 96, 169) A few days after Waddell wrote a letter that USOC claims established Waddell's agreement not to use "Olympic" (J.A.I

96; R.17 at Ex. C), Waddell wrote again to USOC, asserting a right to use "Olympic," and within a few more days an attorney for SFA&A and Waddell wrote, asserting the Gay Games' organizers had a constitutional right to use "Olympic" and offering to place a disclaimer, "not associated with the U.S. Olympic Committee ," on all Gay Games paraphernalia and literature; USOC rejected that offer. (J.A.I-30; R.5 at Ex.s' A-D) The District Judge who granted the preliminary injunction in this case characterized these communications thusly: "each party was under the impression that it had forced its wishes upon the other party and that each had achieved its respective goals." (P.Cert.App.8, p.101).

In any event, it is undisputed that from February 1982 until enjoined from doing so in August 1982, SFA&A sponsored and promoted the "Gay Olympic Games," openly using the word "Olympic," just as SFA&A's attorney had told USOC's attorney in writing that SFA&A would do; USOC claimed to be unaware of the resumed use of "Olympic" by SFA&A until June 1982. (J.A.I-31-35, 97; R.5 at Ex.s' A-D) On August 9, 1982, on the eve of commencement of what were to be the "Gay Olympic Games," USOC and IOC brought this federal civil action against SFA&A and Waddell, and immediately sought and secured a temporary restraining order against use of the word "Olympic" in conjunction with the Gay Games. (J.A.I-5-56; text of the temporary restraining order is at J.A.I-39-40).

As of August 1982, when USOC and IOC sued SFA&A and Waddell and secured injunctive relief prohibiting their use of the word "Olympic" in conjuction with promotion of the "Gay Games," an undetermined number of athletic competitions as well as hundreds of business organizations existed in the United States that were identified by the words "Olympic" and/or "Olympics," in combination with other words and phrases. (R. 13 at Ex. B; R. 17 at App. I and Ex.s' BB, EE, F and unmarked exhibits submitted at hearing on August 19, 1982 (R. in undesignated envelope)); J.A.I-89, 93, 99, 143; P.Cert., App.3 at n.4, pp.56-58). The record in this

case establishes that as of August 1982, when USOC succeeded in enjoining SFA&A from using "Olympic" to name and identify its athletic games, and upon its paraphernalia, including items such as t-shirts, buttons, posters and the like that were to be sold to help meet the expenses of the non-profit corporation incurred in staging the Gay Games, an array of theatrical and/or athletic performances and competitions using "Olympic" in their titles had occurred in the United States in recent months and years, including: International Police Olympics; Armenian Olympics; Olympic of Ballet; Olympics of the Mind; Senior Olympics; Golden Olympics; Firemens Olympics; United States Skill Olympics; Virginia Golden Olympics; Wrist-Wrestling Olympics; Crab-Cooking Olympics; Dog Olympics; Nude Olympics; Rat Olympics; WackyOlympics; Xerox Olympics; Alcoholic Olympics. (J.A. I-93, 97; R.17 at App. A and Ex.s' BB, EE).

As of August 1982 when it sued SFA&A and Waddell, USOC claimed to have formally consented to use of "Olympic" solely in conjunction with promotion of athletic competitions in behalf of mentally disabled persons ("Special Olympics") and youth ("Junior Olympics" and "Explorer Olympics"). (J.A. I-33, 132-133). In the record in the instant litigation, USOC denied consenting to the use of "Olympic" by others staging athletic competitions, and it specifically denied consenting to the "International Police Olympics" staged in the U.S. by police. At the hearing on the motion for preliminary injunction in August 1982, one of USOC's attorneys represented to the District Court, in support of USOC's motion for preliminary injunction, that while USOC had not sued the police athletic organizers, there were "negotiations" in progress with "the Police Olympics people" regarding their use of "Olympic." (U.A.I-143-144).

Yet, as of May, 1984, the record establishes without ambiguity and without contradiction that "[p]olice continue[d] to stage and publicize an annual 'Olympics'", of which USOC was aware, using a five(5)-ring symbol (of

which two (2) rings are handcuffs) as well as the word "Olympics" in the promotional materials. (J.A.II-310-311; R.106 at Ex. B). Other record evidence in this action also contradicts the denial of USOC's attorney that it consented to the "Police Olympics," and indicates that USOC had consented to use of "Olympic" by police to promote an annual, international athletic competition in the United States. As of March 1982, the International Olympic Committee ("IOC") by its Director, Monique Berlioux, stated in writing that USOC's "consent" to uses of "Olympic" "is not unreasonably withheld," and indicated that USOC's consent had been given to uses of the word "Olympics" by "the mentally retarded and police officers." (J.A. II-250-252). Other than the assertion by USOC's attorney in support of the motion for preliminary injunction in August 1982, concerning alleged "negotiations" of USOC with "the Police Olympics" people (J.A. I-144), the record in the instant case contains not a hint of any legal action actually taken by USOC to prevent use of the word "Olympic" by promoters of the "International Police Olympics," an athletic competition that has been staged with USOC's knowledge since at least August 1982. (J.A. I-100; I-143-144).

While USOC claimed by its attorneys to have brought legal actions against use of "Olympic" to promote athletic competitions other than the Gay Games, the legal actions USOC cited as of August 1982 were not suits against nonprofit promoters of athletic competitions seeking to use "Olympic" outside trade; rather, they were actions to prevent competing registrations of "Olympic" as a trademark, disputes with organizations affiliated with USOC, and litigation against commercial corporations purchasing USOC's trademarked goods. (J.A.I-57-58, J.A.II-216-217; R.11 at Ex.s' K-M; R.72 at Ex.'s N-R) The only other civil suit shown of record that was brought by USOC against a nonprofit organization not affiliated with USOC, for promoting a competition as an "Olympics," other than the instant one, was filed by USOC against the March of Dimes

Birth Defects Foundation, *after* USOC's suit against SFA&A, and *after* SFA&A counterclaimed that USOC was using its power as to "Olympic" censoriously and discriminatorily, to prevent only those "Olympics" of which it disapproved, such as the "Gay Olympics." (J.A.I-173-176; J.A.II-217; R.72 at Exhibit O thereof).

Meanwhile, immediately after issuance of the t.r.o. against SFA&A's use of "Olympic" in August 1982, SFA&A by its volunteers acted rapidly and diligently to obey the t.r.o., issued approximately two (2) weeks before commencement of what was to have been the "Gay Olympic Games." Volunteers for SFA&A spent days excising the offending word from t-shirts, buttons, posters and other paraphernalia, as well as from literature of the organization, cancelling orders for merchandise containing the offending word, "Olympic," changing orders for printed matter, removing the word from their vocabularies insofar as inquiries and telephone calls about the upcoming Gay Games were concerned, dealing with the belief stemming from the suit and injunction that the event itself had been enjoined and/or cancelled, advising business owners including gay community media representatives not to use "Olympic" in conjunction with articles and physical property associated with the event, and, in general, meticulously conforming to the prohibition of use of "Olympic" placed upon them by the terms of the t.r.o. and the preliminary injunction. (J.A.I-88-92, 94, 95, 101, 102, 105, 107, 109, 110-111, 112, 114, 115) (The t.r.o. appears at J.A.I-39; the preliminary injunction appears at J.A.I-163).

While petitioners and those associated with them obeyed the injunctive orders, they averred in sworn declarations that they felt "fear. . . as to the consequences to them and others if there are any errors in interpreting and obeying the order" (J.A.I-88), that "[t]o have the TRO on us is like cutting off my soul. . .[and] hurts beyond belief" (J.A.I-91, 92), that they were "upset that the U.S.O.C. has decided to discriminate" (J.A.I-90), that "the 'Gay Olympic Games' are being

selectively prosecuted" (J.A.I-9), that there was "extreme disruption of our organizational efforts" (J.A.I-105), and that "I personally am singled out because I am helping with these Gay Games" (J.A.I-115). Efforts by SFA&A's attorneys failed to persuade the issuing court that the t.r.o. and preliminary injunction were unconstitutionally discriminatory, censorious, and prohibitive of protected speech; likewise, a motion for stay of the preliminary injunction was urged in behalf of SFA&A to the U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit, and it was denied at both levels (J.A.I-48-52, 69-89, 136-140, 147-162).

In September, 1983, after prevailing in the securing of preliminary innunctive relief and in the appeal by SFA&A from that order, USOC and IOC moved for summary judgment and a permanent injunction, *solely* as to their claim that petitioners' use of "Olympic" violated USOC's rights under section 380 of the Amateur Sports Act. (J.A.II 208-218; P.Cert., App.4, pp.62-66, App.6, pp.77-80) In their original complaint, in addition to the section 380 claim, USOC and IOC had pleaded six other causes of action against SFA&A and Waddell; those other causes claimed trademark infringement and unfair competition pursuant to the Lanham Act, violation of USOC's exclusive jurisdiction as to amateur athletics pursuant to the Amateur Sports Act, false designation of origin, false description or representation pursuant to the Lanham Act, breach of contract, and dilution under California law (J.A.I-7-10, 11-14). Other than the claim under section 380, after the complaint was filed these claims "were not subsequently pressed, and are no longer in the case." (J.A.I-7-10, 11-14; P.Cert., App.1, p.2)

SFA&A and Waddell opposed the motion for summary judgment, citing the declarations filed in opposition to the motion for preliminary injunction, as well as filing a further declaration on the subject of USOC's intentionally discriminatory treatment of SFA&A, shown by contrast with USOC's permission of "Olympics" by police and disabled persons, to establish that USOC was not entitled to summary

judgment. (J.A.II-226-252). SFA&A and Waddell contended that triable disputes of material fact were presented on the record, including: (1) whether SFA&A and Waddell had used "Olympic" in a manner "tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with [USOC] or any Olympic activity," 36 U.S.Code section 380(a)(4); (2) whether Waddell intended "to sever the Gay Games from their direct connection with the gay community altogether," which Waddell had denied (J.A.II-219-220; R.74 and Ex.B thereof), and whether SFA&A's and Waddell's intent in using "Olympic" was to invoke a politically and philosophically powerful word, distinct from USOC and any Olympic activities, or to confuse the public as to some purported relationship between SFA&A and USOC or the Olympics; (3) whether SFA&A's use of "Olympic" was defensible as "fair use in descrption," permissible under the Lanham Act, 15 U.S. Code section 1115(b)(4); (4) whether USOC was engaged in state action, rendering its treatment of SFA&A and Waddell subject to constitutional guarantees of equal protection and freedoms of speech and association; (5) whether SFA&A's use of "Olympic" was ideological or commercial speech; (6) whether USOC discriminated against SFA&A relative to other nonprofit and popular stagers of "Olympic" competitions, and, (7) assuming *arguendo* that SFA&A and Waddell had violated USOC's rights, whether an injunction was necessary, given that SFA&A and Waddell had agreed to use a disclaimer, "not associated with [USOC]," in conjunction with any use of "Olympic" (J.A.II-226-246). SFA&A contended that these triable disputes of material fact arose from USOC's complaint and their counterclaims against USOC, and that the existence of these triable disputes precluded summary judgment to USOC. (J.A.II-226-246, 261-268).

The U.S. District Court granted summary judgment and a permanent injunction to USOC, ruling *inter alia* that: there were no triable disputes of material fact in that USOC did not have to prove any "tendency to confuse" as to SFA&A's

use of "Olympic" because any use of "Olympic" in conjunction with promotion of an athletic contest violates section 380; the Lanham Act defenses, including "fair use in description" do not apply to USOC's suits under section 380; USOC is not a governmental actor, and thus no violations of constitutional guarantees were committed by USOC's conduct; and, an injunction was necessary. (J.A.II-270-271)

After prevailing on the merits without a trial, USOC and IOC moved for an award of attorneys' fees, contending that the District Court could award fees to them in its "discretion" and that, even if the Lanham Act requirements that attorneys fees be awarded only in exceptional cases, where the infringement was willful, deliberate, fraudulent or malicious, SFA&A and Waddell were willful trademark infringers. (J.A.II-275-287) In conjunction with that motion, USOC argued that SFA&A and Waddell had used "Olympic" with intent to infringe USOC's trademark. (J.A.II-280-284)

In that motion for attorneys' fees, for the first time USOC also contended that SFA&A, Waddell and others associated with them had engaged in "willful misconduct" and a "contemptuous...act" in "direct violation of this Court's preliminary injunction" (J.A.II-285), by printing an item in an SFA&A publication that contained the language, "1986 Lesbian/Gay Winter Olympic Games" and by permitting two former International Olympics participants to wear their official Olympic sweatshirts, which bear the escutcheon of USOC, 36 U.S. Code Section 380(a)(2), when these persons lit a flame at the opening of the Gay Games in San Francisco in 1982. (J.A.II-285, 288 at para. 4; R.97 at Ex. A). SFA&A and Waddell factually countered these accusations of contemptuous violation of the injunctive orders, showing them to be highly distorted and misleading in nature (J.A.II-302-305, 308-310; R.105 and 106, and Ex. A thereof.)

Even so, the District Court apparently gave some credence to USOC's agrument that SFA&A and Waddell had "subsequently picked up the name 'Olympic' again" after being enjoined from doing so. (J.A.II-338-339) Based in significant

part upon declarations by USOC's attorneys that were filed at the time for reply, after SFA&A's opposition to the motion for attorneys fees had been submitted (J.A.II-318-328), the District Court awarded $96,600.00 in attorneys fees to USOC, holding that SFA&A and Waddell were willful trademark infringers, that their constitutional defenses were irrelevant to the award of fees against them, and that "[a]n award of attorneys fees in this case also promotes the goals of the Amateur Sports Act." (P.Cert., App.4, pp.67-76)

On January 27, 1986, the U.S. Court of Appeals for the Ninth Circuit affirmed the grant of summary judgment and of a permanent injunction in favor of USOC and IOC, but reversed and remanded the award of attorneys' fees made by the District Court. (P.Cert., App.1, pp.1-24) The Court of Appeals' opinion on the merits concluded generally: that it is unnecessary for USOC to prove tendency to confuse in order to prevail under section 380(a)(4); that the defenses to trademark infringement developed under the Lanham Act, including "fair use in description," do not apply under section 380; that because USOC is not a governmental actor, there need be no determination of the "difficult issue of the applicability of equal protection" nor of the factual question as to USOC's alleged discrimination; that because "the word 'Olympic' [is] . . . essentially property," USOC can enjoin the Gay games' organizers' use of "Olympic" without violating First Amendment rights; and that "while a declaratory judgment might have sufficed, providing injunctive relief was not, given SFAA's past use of the protected word and symbols, an abuse of discretion." (P.Cert., App.1, pp.1-15) On the question of attorneys' fees, the Court of Appeals remanded for the District Court to determine whether SFA&A's and Waddell's conduct was sufficiently "exceptional" to justify the award, and, if so, to determine whether the fees requested are reasonable, given "the rather impressive amount of time accumulated on this case" by USOC's and IOC's attorneys. (P.Cert., App.1, pp.15-24)

On May 22, 1986, the Court of Appeals rejected SFA&A's

petition for rehearing and suggestion of *en banc* review, and the panel deciding the case amended its opinion concerning the issue of state action. (P. Cert., App.2, pp.25-27) On May 28, 1986 an opinion of three judges of the Court of Appeals was issued, dissenting from the denial of *en banc* review. (P.Cert., App.3) In that opinion, the dissenting judges reasoned that "...when cut loose from their conceptual moorings, intellectual property rights can raise serious constitutional concerns", (P.Cert., App.3, p.38), and the USOC's "stewardship over the word Olympic" appears to have been exercised against the Gay Olympic Games' promoters "pursuant to a subjective assessment of the wholesomeness of the proposed speaker or propriety of the proposed message" (P.Cert., App.3, pp.40-41). Accordingly, the dissenters urged that the "serious constitutional concerns" raised by the appellate panel's opinion on the merits, and the "blunderbuss injunction entered against SFAA", should have received *en blanc* review. (P.Cert., App.3, pp.47-52) On August 19, 1986, SFA&A and Waddell petitioned this Court for certiorari to review the decision of the U.S. Court of Appeals for the Ninth Circuit, and, on October 20, 1986, this Court granted the writ of certiorari.

SUMMARY OF ARGUMENT

It is beyond dispute that, in the United States today, there are many and various users of the word, "Olympic," including both primarily commercial enterprises and basically non-commercial ones. Petitioners SFA&A and Waddell contend that USOC should not be legally empowered to silence only those uses of "Olympic" that offend USOC, without regard to trademark and constitutional considerations. The lower court's decision in this case sanctions that legally unconscionable outcome. It empowers USOC to wield the potent claim of trademark infringement without fulfilling its attendant burden of proof, and to use the weapons of civil suit and injunction in order to target and restrain those persons and associations whose uses of

"Olympic" fail to please USOC, while allowing uses of "Olympic" by those groups with whom USOC has chosen to co-exist. In permitting these results, the Court of Appeals' opinion on the merits jumps outside basic boundaries of statutory interpretation and vaults over fundamental constitutional guarantees.

It is the statutory position of petitioners SFA&A and Waddell that Congress did not intend to bestow such unbridled and dangerous powers upon USOC, by the enactment of section 380. It is petitioners' constitutional position that, if Congress did so intend, the guarantees of free expression, free association and equal protection have been violated by enactment of section 380.

The express requirement that, in suing to prevent use of "Olympic" by unconsented-to users, USOC must prove that the challenge uses "tend...to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with...[USOC] or any Olympic activity," 36 U.S. Code section 380(a)(4), was methodically crossed out of the statute by the lower courts, at each stage of this litigation from the granting of the t.r.o. to the affirmance of the summary judgment on its merits, just as surely as SFA&A's volunteers crossed "Olympic" off their paraphernalia. That excision by the lower courts cut into the plain intent of Congress to require USOC to prove trademark infringement in order to secure remedies for it, under section 380(a)(4), just as deeply and unnecessarially as the excision of "Olympic" from petitioners' materials cut into their rights of free expression and association. Likewise, the lower courts' unreasoned refusal to harmonize section 380 with trademark law, by their determination to make Lanham Act defenses including "fair use in description" inapplicable to adjudge the legality of a use of "Olympic," displaced the clear intent of Congress. While Congress gave USOC the power to bring "civil action...for the remedies provided in...the Trademark Act of 1946," 36 U.S. Code Sec. 380, the lower courts discarded that explicitly limited empowerment of USOC, and fancifully

imposed upon Congress a grandiose and constitutionally unwary intent to enable USOC to secure remedies against virtually every and any use of "Olympic," regardless of the trademark consequences, purpose, context or circumstances of the use of "Olympic."

Assuming for the sake of argument that Congress was free to bestow a trademark upon USOC as to the words "Olympic" and its derivatives, in order to enable USOC to raise funds to sponsor U.S. amateur athletic participation in the Olympic Games, the force of that trademark should be stopped short of becoming a license to censor and discriminate. Yet the Court of Appeals' open vindication of USOC's almost totally unlimited claim of power as to "Olympic" permits USOC to pick and choose, on the basis of whimsy, discriminatory intent, or subjective aesthetic reaction, among essentially all users of "Olympic," slapping injunctions and attorneys' fees awards (or not) upon whomever and whatever it pleases.

Under the interpretation of USOC's power as to "Olympic" rendered by the U.S. Court of Appeals for the Ninth Circuit in this case, USOC can enjoin an author or publisher who uses "Olympic" in the title of its publication (unless the publication is distributed free of charge); USOC can sucessfully sue the playwright, artist or athlete who proposes to create and promote a new type of "Olympics," regardless of whether the new "Olympics" has any conceivable likelihood of being mistaken for USOC's activity; USOC can secure an injunction as to the use of "Olympic" by whichever groups of people USOC decides should not have their own "Olympics," be they gay persons, police, Armenians or black schoolchildren, and regardless of whether their contests are serving charitable or expressive purposes. The havoc wreaked by the Court of Appeals' opinion, in First Amendment terms, finds no logical limit in the terms of that opinion.

The instant case demonstrates the constitutional harm in a dramatic and precise way. Purporting to be litigating against

a "willful trademark infringer," USOC has secured broad injunctive orders, and, potentially, a substantial award of attorneys' fees, in litigation against a nonprofit corporation and a volunteer, who used the generic, historic and widely adopted words, "Olympic," "Olympics" and "Olympiad" (and *not any other* trademark, service mark, trade name, symbol, emblem or insignia of USOC or IOC protected by any law) for expressive and beneficent purposes. The U.S. Olympic Committee's section 380 victory in this case, if any, should have obliged it to try the disputes of material fact presented, and should have depended upon proof of the elements of trademark infringement set forth in section 380, and upon the absence of proof of a recognized Lanham Act defense and the absence of any proved defense to that infringement. As to the statute itself, SFA&A and Waddell also contend that they cannot in any case be held to have been "*willful* trademark infringers" as to "Olympic," in that to prove "wilfullness," USOC would have to show that SFA&A acted in knowing or intentional violation of USOC's rights as to "Olympic," when the relevant boundaries upon those rights were not drawn in 1982 and are at issue in this very case.

The lower courts' readings of section 380 cannot possibly be squared with the First, Fifth and Fourteenth Amendments. That squaring of an Act of Congress with the Bill of Rights is obligatory upon the courts where, as in the instant case, a party seeks to invoke judicial power to enjoin use of politically symbolic and powerful word, as against one (or even all) users of that word.

USOC is a state actor; in performing its clearly governmental functions (36 U.S. Code sections 374 et seq.) as the manager, fund-raiser and standard-setter for U.S. participation in the Pan-American and International Olympic Games, which it was chartered by Congress to do, USOC's conduct fits within all known and familiar definitions of state action. Moreover, the process of constitutional reckoning cannot be avoided where a judicial injunction reaches the protected

communication of ideas and emotions, because the injunction itself represents governmental action, even if this Court were to hold as a matter of law that USOC is not a governmental actor despite the direct derivation of its existence and powers relevant to this dispute from an Act of Congress.

Even if petitioners' use of "Olympic" could be held as a matter of law to constitute an infringement of USOC's trademark, that infringement could and should have been remedied by the requirement of a disclaimer, as a matter of constitutional law governing commercial speech. Months before USOC sued SFA&A, SFA&A offered to place a disclaimer upon all of its uses of "Olympic," stating in exact words that SFA&A's activities including the Gay Games are "not associated with the U.S. Olympic Committee". (R.5 at Ex.C) In light of that fact, and the case law emphasizing the necessity of avoiding enjoining protected speech in trade cases, the injunction issued below was an excessive remedy, even assuming *arguendo* that SFA&A's use of "Olympic" properly could be characterized as commercial speech that would infringe the mark, absent the disclaimer. The injunctions issued and upheld below would have overstepped ordinary trademark law bounds, in a standard trademark infringement action; surely here, in this non-standard case, a disclaimer was exactly the most extensive remedy that the statute and the Constitution should have been carefully read to require.

ARGUMENT

I. SECTION 380 OF THE AMATEUR SPORTS ACT REQUIRES A SHOWING OF TENDENCY TO CAUSE CONFUSION, MISTAKE, DECEPTION OR FALSE SUGGESTION OF AN ASSOCIATION WITH USOC IN CONJUNCTION WITH AN ACTION AS TO UNCONSENTED-TO USE OF "OLYMPIC"; USOC SHOULD HAVE BEEN OBLIGED TO MAKE THAT SHOWING AT BAR.

In relevant part, section 380 gives USOC a right of action as to unconsented-to commercial or promotional[1] uses of "the words 'Olympic,' 'Olympiad,' 'Citius Altius Fortius,' *or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with ___ [USOC] or any Olympic activity.*" (emphasis added) This language, as well as other language in section 380 and the legislative history of the section, strongly evinces an intent on Congress' part to require USOC to prove trademark infringement as to any use of "Olympic" as to which it brings "a civil action...for the remedies...[in] the Trademark Act of 1946." The purpose of section 380 was identified in Congress to have been to enable USOC "...to protect certain symbols, emblems, trademarks, tradenames and words by civil action pursuant to the Trademark Act of 1946." House Rep't. No. 95-1627, in U.S.Code Cong. & Admin. News pp. 7483, 7488 (1978)

The particular and specific purpose of enactment of section 380, as to the word "Olympic," was to clarify that USOC had a right to bring a civil action against trademark

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[1] The types of uses of "Olympic" reached by section 380(a) include "uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition...". By the express reasoning of the opinion of the Court of Appeals, any "advertising" containing the word "Olympic," any "selling of products with the word 'Olympic' on them," and any "promotion... of games" constitute prohibited uses under section 380. (PCert., App.1, p.4)

infringers as to that word; this right was created by section 380, because the criminal penalties as to use of "Olympic" had proved to be unworkable due to the apparently insuperable burden of proving criminal intent. *Id.* at 7488, 7496. It would be difficult to believe, much less to reason from the language and legislative history of section 380, that Congress meant to move so drastically, from requiring that a criminal intent with regard to unauthorized use of "Olympic" be proved to requiring that USOC prove nothing whatsoever as to the user's intent.

Yet it is this leap to an unlikely statutory construction, which affords USOC a right to prohibit all uses of "Olympic" by an unconsented-to user except those lacking a commercial element howsoever subsidiary *and* not engaged in promotion of any competition, that the lower courts made throughout this litigation. From the determination of the District Court that it could find the standards for preliminary injunctive relief met because it "may presume that defendants' actions tend to cause confusion and mistake and tend to suggest falsely a connection . . .[with USOC]" (P.Cert., App.8, pp.114-115) to the affirmance of that preliminary injunction by the Court of Appeals, as well as in the grant of summary judgment and the opinion affirming that judgment, at each crucial stage the lower courts removed the statutory hurdle to USOC's wholesale prohibition of almost all uses of "Olympic," by excising the plain requirement of proving tendency to confuse from the Act (P.Cert., App.7, p.87 ("we do not mean to imply that it is necessary in this case to prove a tendency to confuse"); P.Cert., App.4, p.63 (promotion of an athletic competition *per se* is "sufficient violation to impose liability"); P.Cert., App.1, pp.4-7 ("we conclude that [proof of] confusion is unnecessary")). The requirement that USOC prove tendency to confuse or the like as to the use of "Olympic" it challenged should not have been cast aside by the lower courts; their disregard of this facial requisite of a section 380 violation as to "Olympic" removes the conceptual border of "trademark infringement" from USOC's claim, in

this and every future case of unconsented-to use, resulting in unprecedented power on the part of USOC to use civil process to prohibit non-infringing and non-damaging uses of the word "Olympic."

The "language employed by Congress" as to the word "Olympic" in section 380, and the "ordinary meaning of that language" as developed in the Trademark Act, to which section 380 expressly refers in giving USOC the right to sue in certain situations, require this Court to interpret Congress' intent as one bestowing nothing more than a trademark upon USOC. *Park 'n' Fly* v. *Dollar Park 'n' Fly*, ___U.S.___, 105 S.Ct. 658, 662 (1985). USOC's attempt in this litigation to establish that it has greater rights in "Olympic" than a holder of an incontestable trademark (Opp.P.Cert. pp.4-5), and to persuade this Court that those greater-than-trademark rights should be upheld regardless of the tendency of others' uses of "Olympic" to cause confusion or, not of the like, should fail as a statutory matter.

USOC apparently asserts that it has more than a trademark on "Olympic" and should be free to prohibit whatever uses of "Olympic" displease it, even where the uses are not definably commercial, and even where there is no proof that they have any tendency to cause confusion as to the origin of products or services or as to a relationship of the user with USOC. (Opp.P.Cert. pp.4-9) USOC has argued in this litigation that "any unauthorized use of 'Olympic' would be unlawful [under section 380]" (J.A.I-21) and that any promotion of an athletic competition as "Olympic," regardless of the presence or absence of any commercial element, constitutes a violation of section 380.[2] (J.A.I-117)

The position of USOC, that it may freely go about using the institution of the law to prohibit and gain remedies for

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[2]USOC has not even unambiguously admitted in this case that newspaper reporting is free of section 380 constraints, stating only that one exception to section 380 "*may be*" accurate news reporting of "the Olympic Games." (J.A.II-189) (emphasis added)

any uses of "Olympic," whether or not these have any tendency to cause confusion, mistake, deception, or false suggestion of a relationship with the USOC and/or the Olympic Games, frontally disregards the terms and purpose of section 380. In accepting that position of USOC as to its possession of a trademark-plus as to "Olympic," the lower courts in this case have yielded an interpretation of section 380 that cannot be upheld upon the terms, history or purpose of the statute.

II. PETITIONERS CLAIM THAT THEIR USE OF "OLYMPIC" TO DESCRIBE AND IDENTIFY THE GAY GAMES CONSTITUTED A "FAIR USE IN DESCRIPTION"; THIS LANHAM ACT DEFENSE TO USOC'S CLAIM OF TRADEMARK INFRINGEMENT SHOULD BE AVAILABLE UNDER SECTION 380 AND IT SHOULD HAVE BEEN TRIED BELOW.

From the beginning of this litigation, the promoters of the Gay Games claimed that their use of "Olympic" was defensible as a "fair use in description" as against USOC's charge of "trademark infringement," in that SFA&A and its participants used and sought to use "Olympic" "in good faith only to describe to users the goods or services" consisting of the Gay Olympic Games (J.A.I-84-85). This defense is permitted even as against an incontestable trademark, 15 U.S. Code section 1115(b)(4).

The essence of this defense by SFA&A is that its use of "Olympic" was not a trademark use, 15 U.S. Code section 1115(b)(4); see also, *Abercrombie & Fitch Co.* v. *Hunting World Inc.*, 537 F.2d 4 (2nd Cir. 1976); *Soweco Inc.* v. *Shell Oil Co.*, 617 F.2d 1178 (5th Cir. 1980) (good faith dissemination of trademarked word(s) in description of goods or services or in description of geographic origin defends against claim of trademark infringement). This defense was not tried below because the District Court in granting summary judgment to USOC held that the defenses to claims of trademark infringement developed under the Lanham Act do

not apply in section 380 litigation. (P.Cert., App.4, p.64) The Court of Appeals specifically affirmed the District Court on that point. (P.Cert., App.1, p.7)

The reasoning of the Court of Appeals as to the inapplicability of Lanham Act defenses under section 380 appears to be a bootstrap. The Court of Appeals reasoned in pertinent part that "[i]n light of the purpose of the Act, which gives the USOC more power than any ordinary trademark holder by allowing it to prohibit non-confusing uses," Lanham Act defenses were "irrelevant." (P.Cert., App.1, p.7-8) If this Court determines, as SFA&A argued above, that Congress did not empower USOC to prohibit uses of "Olympic" that are not proved to have a tendency to confuse or the like, then, logically, the Court of Appeals' primary reason for reading Lanham Act defenses out of section 380 falls.

Moreover, the preclusion of the "fair use in description" defense in section 380 litigation places unconsented-to users of "Olympic" in a worse legal position than commercial users of other terms fairly to describe the nature or origin of their goods or services are under the Lanham Act, for no logical reason. While the commercial user of "gracious ladies," "safari," or "I love you" is free to defend its use of the trademarked term by proof of fair use in description, the non-commerical user of "Olympic" is not. See, e.g., *Abercrombie & Fitch Co.* v. *Hunting World Inc.*, *supra,* 537 F.2d 4 (2nd Cir. 1976)(where the term "safari" is not used as a trademark, but for description, there is no infringement even of otherwise incontestable mark); *Gracious Lady Service Inc.* v. *Welcome Wagon International Inc.*, 295 F.Supp. 1373 (D.Pa. 1969); cf. *MBH Enterprises Inc.* v. *WOKY Inc.*, 633 F.2d 50, 53-55 (7th Cir. 1980) (court refused to enforce registered service mark on "I love you," stating in relevant part that "[t]here is a limit to the ability to appropriate the language for exclusive commercial use").

At no point in this litigation has USOC offered a convincing reason to support this inequitable and disharmonious consequence, in trademark law terms, that results directly

from USOC's position that the "fair use in description" defense should not apply to protect non-trademark descriptive uses of "Olympic," such as that which SFA&A avers it was engaged in at bar.

In their opposition to the petition for certiorari, USOC and IOC have argued to this Court that the real nature of section 380 is an anti-dilution protection as to "Olympic." (Opp.P.Cert. pp.6-9) SFA&A respectfully submits that USOC's anti-dilution arguments at this stage represent a severe shifting of ground in this litigation; USOC did not litigate its anti-dilution theory, nor offer any factual evidence at any stage to support its application to SFA&A's use of "Olympic" at bar, until this case came to this Court. Indeed, after pleading a cause of action for dilution under California law (J.A.1-14), USOC submitted no evidence nor any argument on that claim. The dilution claim, along with all claims, other than the section 380 claim for infringement of USOC's trademark on "Olympic," was "not subsequently pressed, and [is] no longer in the case." (P.Cert., App.1, p.2) USOC concedes in this Court that the "summary judgment was based solely on section 380." (Opp.P.Cert. 6 at n.5) In these circumstances, petitioners SFA&A and Waddell respectfully suggest that USOC's departure from the "trademark infringement" approach in favor of the "anti-dilution" theory, in opposition to the petition for certiorari, represents a reaction to the potential subsidence of the ground upon which the judgment below was granted and affirmed.

Even so, USOC's argument that section 380 is chiefly intended to provide it with anti-dilution remedies for the proliferation of "Olympic" products and services at first blush might appear to provide a reason for effacing Lanham Act defenses from section 380 litigation, as the courts have done in the instant case. After all, if as USOC contends, Congress' real purpose in enacting section 380 was to provide a "new cause of action [for] protection for Olympic-related designations apart from the protection provided by the

Federal Trademark Act (footnote omitted)," trademark infringement defenses then logically would not apply under section 380.

However, careful consideration of the "anti-dilution" interpretation of section 380 that USOC now urges upon this Court shows its considerable weaknesses. There is no mention of the purpose of giving USOC rights or remedies to prevent dilution in the language or legislative history of section 380. The section instead is phrased in terms of trademark infringement concepts, and refers, in the part bestowing a right to sue on USOC, expressly to the Trademark Act of 1946.

In interpreting section 380, at least one federal court has observed in pertinent part that:

> Notwithstanding the broad wording of subsection (c) it cannot be interpreted to mean that only the defendant (USOC) and its licensees may use the word "olympic" and the enumerated symbols for any purpose whatsoever... it appears that Congress' objective has been to prevent the deceptive or confusing use of these corporations' mottoes, emblems and the like by unauthorized persons... [S]ubsection (c) appears to have been designed to prevent all persons other than the U.S.O.C. from registering the Olympic words and symbols as trademarks or service marks in connection with any types of goods or services whatsoever, rather than as a blanket prohibition of all uses whether commercial or not. What little legislative history there is about this subsection supports this conclusion. *Stop The Olympic Prison* v. *USOC*, 489 F.Supp. 1112, 1119-1120 (S.D.N.Y. 1980).

Furthermore, if one considers the plight of the incontestable trademark holder in general, that holder is in no different position than USOC relative to the risk of dilution arising from the "fair use in description" by others of its trademarked terms. Thus, to hold that USOC can prohibit and secure remedies for uses of "Olympic" fairly to describe

others' goods and services, while requiring all other trademark holders to suffer whatever dilution stems from others' non-trademark uses (that is, good faith uses fairly to describe) of trademarked words, bestows an unjustified advantage upon USOC vis à vis other trademark holders. That advantage is not warranted by the language of section 380, not supported by its legislative history, and not justified by the apparent purpose of section 380, enabling USOC to sue for "the remedies provided... in the Trademark Act of 1946" where unconsented-to users use "Olympic" in misleading and confusing way, in commerce. Nor does USOC's "anti-dilution" rationale for section 380 respond to constitutional considerations, even if there were sufficient support in the history and language of the statute to find it convincing. See R. Shaughnessy, "Trademark Parody: A Fair Use and First Amendment Analysis," 72 Virg.L.Rev. 1079, 1116 and n.193 thereof (Sept. 1986).

There is an additional reason to reject USOC's belated effort to fit section 380 into an "anti-dilution" mold, in order to save the statute from harmonization with the rights of users of "Olympic" outside distinct trademark circles. That reason is simply that when Congress passed section 380, it did not speak a word, in the statute or about it, about intending to prevent all popular contests calling themselves "Olympics" from doing so, even if they were not in any way likely to be confused with USOC or mistaken for the Olympic Games. If this Court were to accept USOC's "anti-dilution" model of the meaning of section 380, in spite of the absence of support for that model in the language, history and declared purposes of that enactment, this Court would be determining in place of Congress that USOC should be entitled to ban all uses of "Olympic" to identify contests, even where such uses do not infringe upon USOC's trademarks in any way. The process of legislative interpretation, which rests ultimately upon a sincere judicial effort to glean Congress' true intent from its words and actions (and occasionally from its silence), would be thoroughly chaotic if this Court were to

adopt USOC's expedient approach to statutory interpretation.

III. IF USOC IS NOT A STATE ACTOR AS A MATTER OF LAW, AT LEAST THE QUESTION OF STATE ACTION CONSTITUTED A TRIABLE DISPUTE OF MATERIAL FACT FOR THE DISTRICT COURT TO DECIDE.

USOC derives its existence from a federal charter; moreover, it derives its claimed power to control use of "Olympic" from a federal statute. 36 U.S.Code section 371 et seq.; *Michels* v. *USOC*, 741 F.2d 155, 157 (7th Cir. 1984) ("The USOC was chartered by Congress in 1950. The Amateur Sports Act of 1978 substantially revised that charter.") The 1978 Act "was enacted in response to years of rivalry, warfare, and confusion among amateur athletic organizations... The Act attacked the problem through structural revision: it created a hierarchical system headed by the USOC, in which the power is vested 'to act as the coordinating body for amateur athletic activity.'" (citation omitted) *Oldfield* v. *Athletic Congress*, 779 F.2d 505 (9th Cir. 1985). There can be no real dispute that the governmental functions of regulating, controlling, sponsoring and raising funds for U.S. amateur athletic activities, including participation of the U.S. in the Olympics, are placed on USOC's shoulders by this scheme of federal law.

Part of USOC's federally created regulatory authority as to amateur athletic opportunities has been exercised by USOC in the determination of what organizations are permitted to hold their own "Olympics." USOC claims in this record that it has exercised this governmentally bestowed power in favor of "Olympics" for disabled persons, in the "Special Olympics," and for youth in the "Junior Olympics" and the "Explorere Olympics." (J.A.I.-33, J32-133) The record also establishes that numerous "Olympics," including an annual international athletic contest called the "Police Olympics," have taken place with the apparent consent of,

and at least without litigative and injunctive intervention by, USOC. (J.A.I-100, 143-144; J.A.II-250-252, 310-311; R.17 at Ex.s' F, Z; R.106 at Ex.B)

USOC's wielding of a power to authorize or veto amateur athletic contests as "Olympics," which power purportedly was bestowed by a federal statute pursuant to a federal charter enabling USOC to perform the unambiguously public function of governing and funding U.S. amateur athletic participation with emphasis upon U.S. participation in the Olympics, raises at least a factual question as to whether USOC was engaged in state action in its conduct in the instant case. Yet the lower courts denied trial upon this issue. (P.Cert., App.1, pp.9-10; App.2, p.25; App.4, pp.64-65)

The facts adduced, showing that USOC's conduct in enfranchising some "Olympics," in permitting others by inaction to prevent them, and in acting to stop the "Gay Olympic Games" from proceeding by that name, establish disciminatory and censorious state action, just as clearly as the Eagle Cafe's racial discrimination under the roof of government constituted state action in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Here, as in *Burton*, USOC is invoking powers bestowed upon it by government to enable it to perform public functions and USOC is using public property (that is, a word bestowed upon it by Congress as well as its resources drawn from public as well as private sources)(J.A.II-190, 206) to enforce discrimination and, even beyond the wrong in *Burton*, to restrain free expression and to chill expressive association among a group of persons concerned about gay/lesbian rights, of whose "Gay Olympic Games" USOC disapproves. (J.A.I-54-55, 178 para.7; J.A.II-249-251); see also, *Evans* v. *Newton*, 382 U.S. 296 (1966); *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

The fact that discrimination and suppression of First Amendment rights are the wrongs claimed at bar ought to distinguish the case altogether from *DeFranz* v. *USOC*, 492 F.Supp. 1181 (D.D.C. 1980), a case repeatedly miscited by USOC below for the proposition that USOC is not engaged

in state action in this case. In *DeFrantz*, the District Court specifically distinguished *Burton* because it involved state-empowered invidious discrimination. *Id.* 492 F.Supp. at 1193.

If, as USOC claims in this litigation, Congress empowered it to regulate amateur athletics *inter alia* by consenting to some popular, amateur "Olympics" while vetoing others, that particular empowerment, when used to discriminate and suppress free expression and association, constitutes state action under *Burton*, and neither *DeFrantz* nor any decision of this Court as to state action stands to the contrary. Even assuming *arguendo* that this Court cannot determine that USOC is a state actor on this record, as a matter of law, the question must be remanded for trial.

> Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.
>
> *Burton* v. *Wilmington Parking Authority*, *supra*, 365 U.S. 715, 722.

The failure of the lower courts in this case to permit a trial on the issue of USOC's state action, in light of the clear precedents of this Court requiring it in cases such as the one at bar, represents a serious departure from those precedents.

The Court of Appeals' attempt to distinguish its determination that there was state action in USOC's denial of certain racing events to women at the 1984 Olympics, in *Martin* v. *International Olympic Committee*, 740 F.2d 670, 677 (9th Cir. 1984), based upon the proposition that "[t]he determination whether state action exists is entirely dependent on the unique facts of each case," citing *Burton*, *supra* (P.Cert., App.2, p.26) denies true respect for this Court's decisions requiring factual determination of the state action issue. In the case at bar, where that very process of proving the "unique facts" to determine the presence or absence of state action was bypassed at both the trial and appellate levels below, the state action precedents of this Court obviously require remand on this issue, at minimum.

IV. THIS COURT NEED NOT REACH THE QUESTION OF STATE ACTION BY USOC IN ORDER TO ADDRESS THE CONSTITUTIONAL IMPLICATIONS OF THE INJUNCTION AT BAR, IN THAT ENFORCEMENT OF USOC'S WILL AS TO "OLYMPIC" BY THAT INJUNCTION ITSELF CONSTITUTES STATE ACTION.

In *Shelley* v. *Kraemer*, 334 U.S.1 (1948), this Court held that judicial enforcement by state courts of racially restrictive covenants violated the Fourteenth Amendment's guarantee of equal protection. Even the District Court judge who granted the preliminary injunction at bar recognized the apparent application of *Shelley* v. *Kraemer* to this case. (P.Cert., App.8, p.121). Moreover, the imposition of an injunction against particular speech surely constitutes state action, for constitutional purposes. *New York Times* v. *United States*, 403 U.S. 713, 714 (1971); *Organziation for A Better Austin* v. *O'Keefe*, 402 U.S. 415, 419 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931).

Assuming *arguendo* that the question of USOC's state action is not resolvable on this record as a matter of law against USOC, the imposition of an injunction against the "Gay Olympic Games," by that name, constituted state action, obligating the lower courts to pay heed to the counterclaims of SFA&A and Waddell that USOC was acting to discriminate and to censor in suing them for use of "Olympic." (J.A.I-172-176) The short shrift given below to these constitutional counterclaims cannot be reconciled with the fact that state action was thoroughly present at bar, as soon as the District Court lent its powerful imprimatur to USOC's alleged discrimination and censorship, by an injunction that enabled USOC to discriminate against and silence the lawful speech of a persecuted minority, on pain of contempt if the enjoined persons resisted. (J.A.I-88-115)

V. THE DOCTRINE THAT GENERIC WORDS CANNOT BE TRADEMARKS IS ROOTED IN PART IN FIRST AMENDMENT CONSIDERATIONS OF PRESERVING FREEDOM OF SPEECH.

In a trademark dispute as to the use of the word "Monopoly" in conjunction with the word "Anti-" to name a game that rivaled "Monopoly" both commercially and ideologically, the U.S. Court of Appeals upheld the "Anti-Monopoly" creator's position, observing in pertinent part:

> "[t]he purpose of the doctrine that generic terms cannot be made trademarks is to prevent the appropriation of a term that is already in wide use among those who are potential purchasers of the thing that the term describes..."
>
> *Anti-Monopoly Inc.* v. *General Mills Fun Group Inc.*, 684 F.2d 316 (9th Cir. 1982), cert. denied., 459 U.S. 1227 (1983).

In this regard, this Court itself recently had occasion to observe that the doctrine of non-trademarkability of generic words serves as a protection against the taking of words from the "public domain," thus preserving the Lanham Act itself against challenge on that point. *Park 'N Fly* v. *Dollar Park 'N Fly*, cited *supra*, __U.S.__, 105 S.Ct.658, 665.

In 1978, Congress took the word "Olympic" from the "public domain" and encapsulated it in a statutory bestowal of a right on the part of USOC to prevent trademark infringement as to it. Congress' purpose in doing this was sufficiently plain; USOC needed a means to raise funds to perform the function of supporting U.S. participation in amateur athletics up to and including the Olympic Games, in which U.S. athletes participate quadrennially, at an international level. Congress' encapsulation of "Olympic" in a trademark, despite its generic-ness and despite its wide use, can be authorized by law only to the extent that the statute also places limits upon USOC's right to claim infringement, consisting in cases such as that at bar of requiring USOC to prove tendency to confuse as to "Olympic," and of enabling

Lanham Act defenses to USOC's infringement claims.

If those statutory contentions are rejected, the creation of this "trademark" by Congress in USOC itself must be scrutinized constitutionally, because such an unlimited power in USOC to control noncommercial along with commerical uses, and to suppress those uses of which it disapproves, generates severe First Amendment problems, as the dissenters from the denial of *en banc* review have set forth. (P.Cert., App.3, pp.28-59) As the dissenters below stated:

> By word Olympic has a meaning unique within our language. It connotes open and intense competition among non-professional athletes, usually involving the best and most accomplished contestants. Thus, we have Special Olympics, Junior Olympics, Police Olympics, even Canine Olympics, normally involving competition among the best and finest within the denoted category. I have great difficulty with the idea that Congress can deny all of us that word, and the ideas it embodies, in connection with all public endeavors... The ideas embodied in the word Olympic can, of course, be expressed by other means, but only in a much clumsier fashion, without the same nuance of meaning.
> (P.Cert., App.3, pp.31-33)

If section 380 is read to mean that Congress intended to empower USOC to be the arbiter of all uses of "Olympic," even among nonprofit groups engaged in essentially noncommercial activity were the sale of items with "Olympic" is a subsidiary financial activity relative to the group's primary exercises of free expression and association, see *New York Times* v. *Sullivan*, 376 U.S. 255, 265-266 (1964) and *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943), then section 380 is unconstitutional as applied to the use of 'Olympic' by SFA&A and Waddell and those associated with them in the promotion of the Gay Olympic Games. The reasoning of the dissenters from *en banc* review below, as to why section 380 would thus be unconstitutional as applied, is comprehensive, and petitioners respectfully defer to that

reasoning in this Brief.

On the matter of the unconstitutionality of section 380 if read as the majority below did, to enable USOC to prohibit virtually every use of "Olympic" other than uses that have no financial element (which would be increasingly difficult to conjure in a world where communication is almost never free from economic costs and consequences), petitioners wish to add one note of emphasis to the reasoning of the dissenters from *en banc* review. In denying use of "Olympic" to SFA&A and Waddell, and in going to court and enjoining that use, USOC acted to discriminate against a group whose rights of free speech and association have proved to be particularly vital to that group's education of and communication with others. R. Rivera, *"Our Straight-Laced Judges: The Legal Position of Homosexual Persons in The United States,"* 30 Hast.L.J. 799, 934 (March 1979) "[n]owhere [other than in First Amendment cases concerning freedoms of speech and association] is there such a consistent respect for the constitutional rights of the homosexual individual"; R. Achtenberg, ed., *Sexual Orientation and the Law*, sec. 9.01 p. 9-2 (New York 1985) ("Freedoms of speech, press, religion, association, assembly and petition have crucial importance in the growth and protection of the legal rights of lesbians and gay males"); J. Gomez, *"The Public Expression of Lesbian/Gay Personhood as Protected Speech,"* 1 Law & Inequality: Jour. Theory & Practice 121, 132 (1983); see, e.g., *Toward a Gayer Bicentennial Committee* v. *Rhode Island Bicentennial Foundation*, 417 F.Supp. 632 (D.R.I. 1976); *Alaska Gay Coalition* v. *Sullivan*, 578 P.2d 951 (1978); *Gay Law Students of Hastings College* v. *Pacific Telephone & Telegraph Co.*, 24 C.3d 458 [156 Cal.Rptr. 14](Cal.Sup.Ct. 1979).

The vitality of those precious constitutional rights depends upon consistent and civilized judicial interpretation of the First and Fourteenth Amendments in application to cases concerning gay/lesbian speech and association. These amendments should mightily guarantee nondiscrimination

by government against the protected expression and association of unpopular groups, such as gay and lesbian persons in the U.S. today. By the guidance of decisions such as *Police Department of Chicago* v. *Mosley*, 408 U.S.92, 98-99 (1972) ("justifications for selective exclusions from a public forum must be carefully scrutinized... discriminations among [speakers] must be tailored to serve a substantial governmental interest"), the right of SFA&A to have a "Gay Olympic Games," absent a showing of real harm and real injury to the governmental interests served by USOC's control of "Olympics" generally, should be located firmly at the center of constitutional protection. See also, *City of Los Angeles* v. *Preferred Communications*, ___U.S.___, 106 S.Ct. 2034, 2035-2037 (1986); *City of Madison* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976).

It is noted in this regard that USOC never proved any injury to it by SFA&A's holding of a "Gay Olympic Games," much less any jeopardy to the governmental interests that USOC has been empowered by Congress to serve. In curbing protected speech and association, the party seeking the curb is supposed to prove that the curb serves a compelling governmental interest and that no alternative that does not so affect speech or association is available. *Police Department of Chicago* v. *Mosley* and *City of Madison* v. *Wisconsin Employment Relations Department*, *supra*; *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975). Not only did USOC make no such showing of a compelling governmental interest and absence of non-burdening alternatives below; USOC never proved that it was in any way harmed by the promotion of a "Gay Olympics" by that name.

The possibility of a "Gay Olympics" peaceably and productively co-existing with the Special, Junior and Explorer Olympics that USOC openly approves, and with Olympics by Police and others that USOC tacitly condones, cannot be presumed to harm USOC, as the courts below seemed willing to do. If there is harm to the interests that

USOC is supposed to serve, by this proposed co-existence, certainly the guarantees of free speech, free association and equal protection require that that harm be *proved*, and that ways of preventing that harm that do not burden constitutional freedoms be *considered* before a ban on speech is imposed.

VI. THE INJUNCTION PROHIBITING SPEECH AND CHILLING EXPRESSIVE ASSOCIATION THAT THE LOWER COURTS UPHELD DOES UNNECESSARY CONSTITUTIONAL INJURY, AND A DISCLAIMER WOULD AND SHOULD HAVE AVOIDED THIS INJURY.

In upholding the blanket prohibitory interpretation of section 380 urged upon it by USOC, the Court of Appeals did not engage in the required regimen of rigorous and careful constitutional decision-making where free speech interests are at stake. See cases cited in part V., *supra*; see also, *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499 (1984). The Court of Appeals settled instead for an unacceptably casual ratification of the constitutional damage inflicted by the injunction below. That the injunction below fails even to satisfy the requisites of a proper injunction in a commercial speech case is obvious, under a brief reading of trademark and other commercial precedents that establish the impropriety of injunctions where disclaimers will suffice. See, e.g., *Better Business Bureau* v. *Medical Directors Inc.*, 681 F.2d 397, 405 (5th Cir. 1982), citing *In the Matter of R.M.J.*, 455 U.S. 191 (1982) ("although the states may regulate commercial speech, the First and Fourth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests... [t]he absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements"); *Virginia State Board of Pharmacy* v. *Virginia Consumer Council*, 425 U.S. 748 (1976).

Even assuming contrary to the record facts below that

SFA&A could be correctly characterized as engaged in trademark use of "Olympic" in a commercial enterprise, the impropriety of an injunction where no tendency to confuse has been proved and where there is an informational element to the speech being enjoined is well-established in commercial speech precedents. See cases cited *supra*; also, *Consumers Union* v. *General Signal Corp*, 724 F.2d 1044, 1053-1055 (2nd Cir. 1984), cert. denied, __U.S.__, 105 S.Ct. 100 (1984). In *Consumers Union* v. *General Signal Corp.*, holding that the District Court erred in enjoining the commercial company from making any reference to Consumer Report's favorable rating, the Court of Appeals observed in pertinent part: "Disclaimers are a favored way of alleviating consumer confusion as to source or sponsorship... [a]bsolute prohibitions of speech as provided for in the instant preliminary injunction are improper where there is any possibility that an explanation or disclaimer will suffice." *Id.* at 1053. See also, *Champion Spark Plug Co.* v. *Sanders*, 331 U.S. 125, 130 (1947). *Allen* v. *National Video Inc.*, 610 F.Supp. 612, 630-631 (S.D.N.Y. 1985) (injunction against any appearance of Woody Allen look-alike held overbroad, even where prior disclaimer was found ineffective). The injunction here fails to pass constitutional muster, even under the *commercial* speech precedents of the federal courts.

CONCLUSION

The instant case presents an opportunity for this Court to render a clear, simple interpretation of section 380 of the Amateur Sports Act, enabling USOC to continue to enforce its mark as to "Olympic" against real trademark infringers, while requiring it to prove tendency to confuse and to learn to live with those whose uses are defensible under the Lanham Act, as other trademark holders do. Pursuant to such interpretation, USOC's cause of action under section 380 should be remanded for trial.

Whether or not this Court accepts the above-recited view

of section 380, the presence of significant constitutional questions must guide it in interpretation of section 380. Any interpretation of that statute that yields a speech-prohibiting and association-chilling result must be reconciled with the First and Fourteenth Amendments. This is particularly necessary where it is obvious that a variety of groups use the word "Olympic" publicly, symbolically and politically, to fulfill an array of associative and communicative purposes, presumably enriching of the culture, that courts are not normally supposed to use their injunctive powers to select among or prevent. The issues of discriminatory intent, state action by USOC and other factual questions raised by SFA&A's and Waddell's counterclaims should have been tried below.

Regardless of the constitutional shape of section 380 itself, the impropriety of injunctive relief that restrains free expression, where a disclaimer was offered that would have sufficed to avoid that restraint while preventing harm to the interests of the commercial owner, is plain. Accordingly, this Court should order the permanent injunction dissolved in this case, whatever its views as to the statutory and constitutional issues presented as to the meaning of section 380.

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